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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1134

GREGORY PAUL NOONAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals on reargument (Pet. App. 14a–20a) is not yet reported. The opinion of the district court (Pet. App. 1a–13a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 18, 1970. The petition for a writ of certiorari was filed on December 19, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's challenge to local board procedures during the processing of his post-indict-

ment claim to conscientious objector status is a valid defense to a separate crime committed two months prior to the filing of such claim.

2. Whether the refusal to permit petitioner to avoid prosecution by submitting to civilian work in lieu of induction is a denial of "equal protection" notwithstanding his I–A classification.

3. Whether petitioner's order of call was unfairly accelerated by his local board.

STATEMENT

Following a non-jury trial in the United States District Court for the Western District of Pennsylvania, petitioner was convicted of refusing to submit to induction, in violation of 50 U.S.C. App. 462(a). On June 5, 1968, he was sentenced to three years' imprisonment. The court of appeals initially reversed, but, on rehearing, withdrew its prior opinion and affirmed the conviction (Pet. App. 14a–20a).

In December 1967, following his withdrawal from college, petitioner was reclassified from II–S (student deferment) to I–A. He took and passed a pre-induction physical examination, and was ordered to report for induction on March 25, 1968. He reported as directed, but refused to submit to induction (Pet. App. 1a–2a, 15a).

Sixty days later, on May 24, petitioner for the first time requested an SSS Form 150 (Special Form for Conscientious Objector) from his local board. The requested form was supplied him, with instructions to return it on or before June 5, 1968; it was not

returned until September 20, 1968. In the meantime, on June 26, 1968, petitioner had been indicted for having refused induction on March 25; this is the offense for which he here stands convicted (Pet. App. 2a, 15a).

When it received the executed Form 150, the local board sought instructions from the Pennsylvania State Selective Service Director. It was told to consider the merits of the claim of conscientious objection without regard to the possible criminal action, and to determine whether the claim warranted a reopening of petitioner's classification, that is, whether it reflected a change in his status due to circumstances beyond his control since the issuance of the order to report for induction (cf. 32 C.F.R. 1625.2). In his letter to the local board (Pet. App. 2a), the State Director stated:

> Upon consideration of the registrant's claim of conscientious objection, if the board first determines, according to Section 1625.2 of the regulations, that there has been a change in the registrant's status resulting from circumstances over which he had no control, then it may reopen and consider anew the classification of the registrant. However, if the local board finds that there has been no change in the registrant's status resulting from circumstances over which he had no control, but believes that the registrant's claim of conscientious objection has merit, the board may reopen and consider anew according to Section 1625.3 and can consider this letter as authority to so reopen and consider anew.

Petitioner was then accorded a personal interview with the local board to discuss his claim. Following that meeting, the board determined (1) that there was "no change in status," (2) that the "claim does not have merit" and (3) that petitioner "does not meet the criteria for C.O." (Pet. App. 3a, 16a); it thus denied his conscientious objector claim and refused to reopen. Petitioner sought an administrative appeal of this decision, but the board denied his request on the ground that there is no right of appeal from a determination not to reopen (Pet. App. 2a–3a, 15a–16a). The trial and conviction followed.

The court of appeals originally reversed the conviction on the authority of *Miller* v. *United States*, 388 F. 2d 973 (C.A. 9), holding that the local board had in fact reopened petitioner's classification (despite its purported refusal to do so) when it considered and rejected the conscientious objector claim on its merits; that petitioner was therefore entitled to an appeal; and—inferentially—that the order to report for induction, which petitioner had previously violated, was therefore invalid (Pet. App. 14a–15a, 16a–17a). On rehearing, the government accepted the *Miller* holding, but distinguished it. In *Miller*, the alleged procedural infirmity had preceded the refusal of induction; in this case, petitioner's criminal offense had been completed long before the alleged irregularity occurred. Any defect in the subsequent Selective Service proceedings, the government urged, could not have excused or negated that completed offense. The court of appeals, agreeing, reversed itself and unanimously

affirmed the conviction.[1] It held that petitioner could not convert his belated attempt to secure reopening of his classification into a legal defense to a crime he had committed two months before he began that attempt (Pet. App. 17a, 19a–20a).

ARGUMENT

1. The court of appeals' decision is correct and in accord with practically every other appellate decision that has considered the question.[2] See, *e.g.*, *United States* v. *Berger*, C.A. 9, No. 25,130, decided November 9, 1970; *United States* v. *Hart*, 433 F. 2d 950 (C.A. 9); *United States* v. *Secrets*, 428 F. 2d 467 (C.A. 8); *United States* v. *Wilson*, 427 F. 2d 649 (C.A. 9); *United States* v. *Swierenga*, 425 F. 2d 696 (C.A. 6); *United States* v. *Blakely*, 424 F. 2d 1043, 1045 (C.A. 9); *United States* v. *Powers*, 413 F. 2d 834, 838 (C.A. 1), certiorari denied, 396 U.S. 923; *United States* v. *Smegor*, 411 F. 2d 501, 503 (C.A. 7), certiorari denied, 396 U.S. 972; *United States* v. *Stoppelman*, 406 F. 2d 127, 131–132 (C.A. 1), certiorari denied, 395 U.S. 981.[3]

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[1] Two members of the original panel were on the panel which rendered the decision on rehearing. The third member of the original panel had died, and another judge was substituted.

[2] The decision in *United States* v. *Shermeister*, 425 F. 2d 1362 (C.A. 7), while containing dictum to the effect that the Selective Service regulations allow "even post-induction day consideration of" requests to reopen classifications (425 F. 2d at 1365), is distinguishable from the instant case because there the request for a reopening preceded the date of induction.

[3] To the same effect are *United States* v. *Robley*, 423 F. 2d 613 (C.A. 9), petition for certiorari pending, No. 261, this Term; *Straight* v. *United States*, 413 F. 2d 263, 264 (C.A. 9);

Moreover, the local board's refusal to reopen in this case was entirely proper. Even under *United States* v. *Lloyd*, 431 F. 2d 160 (C.A. 9), a decision of questionable validity (see Pet. App. 13a) on which petitioner places heavy reliance, reopening of a classification on presentment of a post-indictment conscientious objector claim is not required unless the local board is requested to do so by the State Director.[1] See 32 C.F.R. 1625.3. In the instant case, the

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Brown v. *United States*, 409 F. 2d 1354 (C.A. 9); *Blades* v. *United States*, 407 F.2d 1397 (C.A. 9); *Palmer* v. *United States*, 401 F. 2d 228 (C.A. 9).

United States v. *Hinch*, 292 F. Supp. 696 (W.D. Mo.), *United States* v. *Kerwin*, 313 F. Supp. 781 (D. Minn.), *United States* v. *Hansen*, 314 F. Supp. 91 (D. Minn.), and *United States* v. *Johnson*, 3 S.S.L.R. 3335 (E.D Wisc., decided March 4, 1970, not officially reported), cited at Pet. 11, all involve acquittals at jury-waived trials of persons charged with refusal of induction, and thus there was, of course, no right of appeal from the judgments. In *Hinch* and *Kerwin*, the Form 150's were filed after the registrants had refused to be inducted, but, unlike this case, were requested from the local boards before the scheduled induction dates. Thus the local boards were at least on notice in these cases of the registrants' intent to assert a C.O. claim prior to commission of the offense; both decisions treat the issue as though it were indistinguishable in principle from that of the late-crystallization cases (cf. *Ehlert* v. *United States*, No. 120, this Term, pending on certiorari). *Johnson* relies in part on the aforementioned dictum of the *Sherminster* case, to which it mistakenly refers as a holding. *United States* v. *Grachowski*, 3 S.S.L.R. 3380 (E.D. Wisc., decided October 9, 1970, not officially reported), also cited at Pet. 11, simply follows the Seventh Circuit decision in *United States* v. *Shields*, 416 F. 2d 935, petition for certiorari pending, No. 72, this Term, as "control[ling]" (see n. 3 *infra*): it is being appealed by the government to the court of appeals.

[1] In *Lloyd*, the State Director had explicitly declined to exercise any discretion under 32 C.F.R. 1625.3 because, in his words, "the registrant has been reported to the United States

State Director expressly refused to authorize a reopening unless the board first found either a change in the registrant's status or some merit to his conscientious objector claim (*supra*, p. 3); it found neither and thus was not compelled to reopen under 1625.3.

Nor was the local board required to reopen under the last proviso of 32 C.F.R. 1625.2, even assuming *arguendo* that that language applies to post-indictment conscientious objector claims. By its terms the regulation expressly forbids a reopening after issuance of an induction order "unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant has no control." Consequently, full consideration of the late claim is a necessary prelude to the board's decision whether to reopen; the consideration itself does not constitute a *de facto* reopening.[4] See our petition for a writ of certiorari in *Laird* v. *Capobianco*, No. 611, this Term, pp. 7–9. The post-indict-

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Attorney and jurisdiction in the matter lies with that official" (431 F. 2d at 171). The judgment of conviction was vacated "pending an exercise by the State Director of his discretion in considering Lloyd's request that the Board be ordered to reopen Lloyd's classification" (431 F. 2d at 171). Thereafter, the State Director did exercise his discretion and refused to order a reopening; the court then modified its earlier decision and affirmed the conviction (*United States* v. *Lloyd*, C.A. 9, No. 25,337, decided December 8, 1970, pending on petition for a writ of certiorari, No. 6390, this Term).

[4] In *Miller* v. *United States*, 388 F. 2d 973 (C.A. 9), the court held that the "consideration" of a post-notice conscientious objector claim was alone sufficient to constitute a *de facto* reopening because there, unlike the present case, the State Director had specifically instructed the local board to reopen on a *prima facie* showing of entitlement to exempt status under 32 C.F.R. 1625.4. See 388 F. 2d at 974–975.

tion-notice situation under 32 C.F.R. 1625.2 is thus different from the pre-induction-notice situation which this Court had before it in *Mulloy* v. *United States*, 398 U.S. 410;[6] the mere presentment of a *prima facie* case for reclassification is simply not enough after there has been an induction notice. See *Penzel* v. *Laird*, 426 F. 2d 1169 (C.A. 2). Even under the rationale of *United States* v. *Graney*, 368 F. 2d 144—a decision which we consider to be erroneous for the reasons stated in our brief in *Ehlert* v. *United States*, No. 120, this Term, but which has been followed by the Third Circuit[7]—to reopen the board must first find both that the beliefs ripened only after issuance of an induction order and that they qualified for conscientious objector status. It could find neither in this case.

Since the court below properly held that petitioner could not avail himself of the post-indictment claim as a defense to the prosecution of his earlier-committed crime, and since, at all events, the refusal to reopen by the local board was in this case procedurally correct under both 32 C.F.R. 1625.2 and 1625.3, there is no cause for further review by this Court.[8]

2. There is no merit to petitioner's contention (Pet. 7–8, 13) that the government's policy allowing a regis-

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[6] Whatever the reach of *Mulloy* in other contexts, that question has no bearing on board action concerning a conscientious objector claim raised for the first time after the date of a registrant's knowing failure to comply with an induction order.

[7] *Scott* v. *Commanding Officer*, 431 F. 2d 1132 (C.A. 3).

[8] This is not, in our view, a case that need be held pending disposition by this Court of our petition for a writ of certiorari in *United States* v. *Shields*, No. 72, this Term. The issue in that case is whether (if the decision is against the government's position in the pending selective conscientious objector

trant who has refused induction to change his mind and accept induction even after an indictment has been returned (resulting in a dismissal of the indictment with the consent of the United States Attorney and by leave of the court), must be extended on an "equal protection" theory to require the government to give a registrant in petitioner's situation a similar opportunity to avoid prosecution by submitting to alternative civilian service as a self-anointed conscientious objector. Petitioner holds a I–A classification: he thus is entitled to no greater privileges than other registrants with the same classification. The fact that he applied for but, after full consideration of his claim and a personal interview, was denied reclassification as a conscientious objector gives him no more right after an indictment is returned to be assigned to civilian work in lieu of induction than he, or any other registrant similarly situated, would have had prior to the indictment. Such alternative service is only for those registrants holding I–O classifications, and petitioner is not within this group.

3. Petitioner's additional contention that he was ordered for induction sooner than he should have been under the applicable law and regulations (Pet. 13–17)

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cases, *Gillette* v. *United States* and *Negre* v. *Larsen*, Nos. 85 and 325, this Term) a local board must consider a selective conscientious objector claim first submitted during a criminal prosecution for willful refusal to submit to induction. In this case, however, the board did consider the claim under the State Director's directive (which also authorized reopening after such consideration only if specific findings could be made). Similarly, because the board actually considered the claim, this case is not concerned with the issue in *Ehlert* v. *United States*, No. 120, this Term.

was rejected by the district court following exhaustive consideration of the pertinent provisions and of all the testimony (Pet. App. 8a–12a). The court of appeals, after an independent review of the testimony and findings, was satisfied from that analysis that the district court had not erred (Pet. App. 20a). In these circumstances, there is no occasion for further review of this largely factual question by this Court. It is not disputed that petitioner was in the class of registrants—nonvolunteers who had attained the age of 19 but not 26 (32 C.F.R. 1631.7(a)(3))—who were then being called by his local board. Nor is there any suggestion of non-compliance with the "oldest • • • first" provision of that regulation. Major James Evans, the manpower officer of the Pennsylvania State Selective Service System, testified that on the basis of his review of the files, classification records, and minutes of meetings of petitioner's local board, he had found no registrant older than petitioner and available for service who had not been called before petitioner (Pet. App. 8a–9a).

Petitioner maintains that during the period in question, the State of Pennsylvania failed to adhere to prescribed procedures for allocating quota credits and debits as between local boards within States on the basis of the number of in-service residents within the respective areas (see 32 C.F.R. 1631.1 *et seq.*). The claim is that inadequate account was taken of enlistees under the Armed Forces' recruitment programs, as distinguished from volunteers processed through their local boards (Pet. 16–17). However, as the district court's opinion shows (Pet. App. 12a),

there was substantial compliance with the regulatory provisions; nor is there any basis for an inference that petitioner has been prejudiced by the Pennsylvania quota allocation.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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FEBRUARY 1971.